

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN MAURICE BERRY,

Defendant-Appellant.

UNPUBLISHED

August 11, 2005

No. 252541

Wayne Circuit Court

LC No. 03-008882-01

Before: Cooper, P.J., and Fort Hood and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant Stephen Maurice Berry appeals as of right from his jury trial conviction of possession of a firearm during the commission of a felony, MCL 750.227b, arising from the nonfatal shooting of Reginald Smith on July 17, 2003. Defendant was sentenced to serve a two-year prison term. We affirm.

Defendant first argues that the trial court erred in denying his motion for a mistrial after a police officer testified that he obtained defendant's picture from a database. We disagree. We review a trial court's decision to deny a motion for a mistrial for abuse of discretion.¹ "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial."² A trial court's decision to admit evidence is reviewed for an abuse of discretion.³

During direct examination, the prosecutor asked a police officer how he became familiar with defendant's name. The officer responded as follows:

By interviewing the witnesses, some of the witnesses and some of the people from the neighborhood, then mentioned the name Stephen and a block

¹ *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

² *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

³ *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

where he used to live. Nobody knew a last name and, based on that information, I found a Stephen Berry, and then I developed—went through our database and we had pictures of a Stephen Berry and I put together a photo line-up because he fit the description, height, weight and age of the Stephen we were looking for who could have done the shooting.

Defendant immediately made a motion for mistrial. In denying defendant's motion, the trial court concluded that having one's picture in a database does not necessarily indicate that the person pictured has a prior conviction. The court opined that most people would not make such an assumption.

"It is well settled that evidence of a prior conviction may be prejudicial to the accused"⁴ However, the police have access to numerous databases and the officer did not indicate that the referenced database was criminal in nature. Further, the response was gratuitous and defendant did not show that the prosecutor knew in advance that the officer would make an arguably improper remark.⁵ Accordingly, defendant failed to demonstrate that the prosecutor acted in bad faith or that defendant was prejudiced by this testimony. The trial court properly denied the motion for mistrial.

Within this issue, defendant further argues that the prosecutor exacerbated the error by subsequently eliciting improper character evidence, over defendant's objection, that defendant's friend, Reginald Coleman, usually asked defendant whether he carried a gun.⁶ As defendant objected on relevancy grounds, rather than pursuant to MRE 404(b), our review is limited to plain error affecting defendant's substantial rights.⁷ Mr. Coleman testified that on the day of the shooting, a group of his friends, including defendant, picked him up. Knowing that they were heading into a fight, Mr. Coleman testified that he asked everyone if they had a gun. He further testified that it was "unusual" for him to ask his friends this question and indicated that defendant did not have a gun that day.

Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith.⁸ The testimony elicited, however, while implicitly indicating the defendant might carry a gun, taken in context is insufficient to establish a propensity. In fact, Mr. Coleman testified that defendant did not have a gun on the day of the shooting. Accordingly, defendant has not established that the admission of this evidence amounted to plain error affecting his substantial rights.

⁴ *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

⁵ See *id.* at 36-37.

⁶ Defendant failed to properly present this issue by including it in the statement of questions presented. We may review this issue, however, as the relevant facts and law are available on the record. See *Health Care Ass'n Workers Compensation Fund v Director of the Bureau of Worker's Compensation*, 265 Mich App 236, 243; 694 NW2d 791 (2005).

⁷ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

⁸ MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Defendant next argues that the prosecution presented insufficient evidence to support his felony-firearm conviction. Again, we disagree. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁹ “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”¹⁰

In order to find defendant guilty of felony-firearm, the prosecution must prove defendant was in possession of a firearm while committing or attempting to commit a felony.¹¹ A conviction for felony-firearm may be had upon proof that the defendant committed an underlying felony, not necessarily was convicted of that underlying felony.¹²

The jury heard the testimony of several witnesses that defendant possessed a gun and fired into the air before Mr. Smith was shot. It is within the province of the jury to assess the credibility of the witnesses, and we will not interfere with their judgment.¹³ Based on this testimony, a rational trier of fact could determine beyond a reasonable doubt that defendant shot Mr. Smith.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

⁹ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

¹⁰ *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

¹¹ MCL 750.227b.

¹² MCL 750.82; *People v Lewis*, 415 Mich 443, 452-453; 33- NW2d 16 (1982).

¹³ *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).